85-1289

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

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George Veillette, Petitioner

v.

United States of America, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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January 23, 1986

## QUESTION PRESENTED

Consistent with Fourth Amendment protections, may material obtained and observations made during a warrantless, non-exigent and thus illegal search and seizure be used in an application for a search warrant, which warrant issues 50 (fifty) hours after such illegal search and seizure?

# INDEX


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Pertinent Constitutional Provisions | 3 |
| Statement of the Case | 3 |
| Argument | 12 |
| Conclusion | 27 |

INDEX TO APPENDIX
(Separately presented)

Appendix One (Appendix 1-96)
United States of America v. Michael Abell, et al., Memorandum Decision and Order on Motions to Suppress, dated November 4, 1983.

Appendix Two (Appendix 97-120)
United States of America v. George E. Veillette, Jr., Appeal from the United States District Court, Dated December 2, 1985.

TABLE OF CASES

Boyd v. United States,
116 U.S. 616, 21

Coolidge v. New Hampsire
403 U.S. 443 (1971) 27

Franks v. Delaware
438 U.S. 154 (1978) 11, 14, 18, 19, 20, 21, 22

Katz v. United States
389 U.S. 347, 88 S.Ct. 507 19 L.Ed. 2d 576 (1967) 12, 13

Segura v. United States
468 U.S. ____, 82 L. Ed. 2d 599, 104 S.Ct. 3380 (1984) 14, 16, 17,

Silverthorne Lumber Co.
v. United States
251 U.S. 385 (1919) 21

United States v. Leon
468 U.S. ___, 82 L. Ed.
2d 677, 104 S.Ct. 3405 (1984) 27

United States v. Place
___ U.S. ___, 77 L. Ed.
2d 110, 103 S.Ct. ___
(1983) 22, 23,
24, 25, 28

Weeks v. United States
232, U.S. 383 21

Wong Sun v. United States
371 U.S. 471, 484, 83 S.Ct.
407, 9 L. Ed. 2d 441 (1963) 21, 27

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Petitioner, George E. Veillette, respectfully requests that a Writ of Certiorari issue to review the judgment of the First Circuit Court of Appeals affirming his conviction in the United States District Court for the Northern District of Maine, which conviction was based upon evidence which, Petitioner asserts, should have been suppressed.

## OPINIONS BELOW

The United States District Court for the Northern District of Maine rendered a decision on November 4, 1983, denying Petitioner's Motion to Suppress. This led to a judgment of conviction entered against Petitioner in that Court on February 1, 1985. Petitioner timely appealed, which appeal was denied by judgment and opinion rendered December 2, 1985, by the First Circuit Court of Appeals, No. 85-1127 (Appendix P. 97 et. seq.)

## JURISDICTION

The judgment sought to be reviewed was rendered December 2, 1985, and entered on that date by the First Circuit Court of Appeals. Jurisdiction is conferred by 28 United States Code §1254.

## PERTINENT CONSTITUTIONAL PROVISIONS

The Fourth Amendment of the United States Constitution provides as follows:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

## STATEMENT OF THE CASE

Drug Enforcement Administration (D.E.A.) agent Michael Cunniff, on June 29, 1982, received word from the Georgia D.E.A. that two suspected marijuana dealers were en route to Maine.

From the Bangor Airport, where the suspects arrived, Agent Cunniff followed them to the Airport Hilton Hotel. Through aural surveillance there, Agent Cunniff came to suspect, by June 30,

1982, that Petitioner's establishment, Thee Motorcycle Shoppe, in Bucksport, Maine, was a storage place for the suspected marijuana. Yet he sought no warrant.

Four days of continued surveillance and two full days prior to the issuance or arrival of any search or arrest warrant, the following uncontroverted facts occurred.

On July 4, 1982, at 3:30 p.m., one Sgt. Harry Bailey, of the Maine State Police, proceeded with eight to ten agents to Thee Motorcycle Shoppe, Petitioner's business establishment in Bucksport, Maine. (Suppression Hearing Transcript page [hereinafter referred to as "ST."] 1012) When they arrived, there was a "Closed" sign in the plate-glass door, as the business was closed for the holiday. The door was locked, and

covered with opaque material. There were no lights on inside, and no cars or vehicles in the vicinity of the Shoppe other than those of the agents. After having the building surrounded, Sgt. Bailey pounded on the door and hollered that he was the police, had the place covered, and that anyone in the building should come out. (ST. 1013)

When there was no response, Sgt. Bailey picked up a cement cinder block, and threw it through the plate-glass of the door with the "Closed" sign on it. (ST. 1015). All of the agents then went inside and searched the building. After entering the garage area, Sgt. Bailey detected a strong odor of marijuana and picked up an opaque, heavy vinyl tarp, which was custom-made to fit snuggly, with snaps, around the outside of the bed of a pickup truck, and observed two bales

of marijuana; (ST. 1016), The fact of these bales being found in the pickup within Thee Motorcycle Shoppe was included in D.E.A. Agent Cunniff's affidavit in support of the warrant to search which was issued on July 6. The District Court suppressed this marijuana, by Order dated November 4, 1983, but suppressed no other evidence relevant hereto. (Appendix One)

After the initial intrusion, in accordance with Sgt. Bailey's intentions to "confiscate that (marijuana)", to seize it "with a search warrant before we left the building", (ST. 1039, 1040), the building remained guarded until the arrival of a search warrant two days later, at 6:30 p.m. on July Sixth. This warrant relied solely upon affidavits of Agent Michael Cunniff, which in turn relied upon Sgt. Bailey's representation

that he had smelled marijuana had and seen the quantity of marijuana by looking under the tarp inside the white pick-up truck. (Appendix 41).

At the same time Sgt. Bailey was raiding Thee Motorcycle Shoppe, 15 or 20 people who were neither implicated nor ever charged with any crime, were at a barbeque and swimming pool party at the home of Edwina Veillette, the wife of Petitioner, for the Fourth of July holiday, one or two hundred yards from Thee Motorcycle Shoppe. A number of people were preparing to swim, sunning themselves, or preparing to cook hot dogs, (ST. 1148). At 3:30, a squad of armed, uniformed and plain-clothed agents, ran towards the gathered people, (ST. 1148, 1149) with .357 and .45 calibre pistols, shotguns, rifles and an Ouzi sub-machine gun, a semi-automatic,

Israeli-made weapon. The uniformed trooper carrying the Ouzi kept one Mr. Morang and his wife subdued in the pool by pointing the sub-machine gun at him, as an agent announced to the gathering that they were all under arrest (ST. 1149).

Meanwhile, a Trooper Moody, with two other armed officers, ran into the house, held a gun at fourteen-year-old Dawn Bowley, interrupting her video Pac-Man game with ten-year-old Samantha Stubbs. (ST. 1140). Ms. Bowley was then grabbed by an officer, after which she asked if she could go get her friend, and was told no. (ST. 1141) She was then escorted out of the house by three armed officers at gunpoint. (ST. 1144).

Trooper Moody, with other officers, searched the entire house. (ST. 1197)

At the time of the initial raid,

Mrs. Veillette, whose invitation had brought everyone together for the party, was standing in her side yard conversing with friends. (ST. 1175). She watched several armed troopers and agents take positions around her side yard. She saw some others coming out of the woods and still others coming out of the front door of her home. (ST. 1175)

The agents told everyone to freeze and shut up. Finally, Trooper Moody asked, "Whose house is this?" When Mrs. Veillette said it was hers, she was asked who she was. (ST. 1176). Then she was asked to have her friends supply the agents with identification. (ST. 1176).

Sgt. Bailey, who had until this time been searching Thee Motorcycle Shoppe, and exposing the film in Mr. Morang's camera to destroy evidence of the raid, (ST. 1152), then took Mrs. Veillette by

the arm, accompanied by several officers and escorted her into her house. (ST. 1177). She was then placed under arrest, apparently for a drug offense, though no evidence of this had appeared to support such a charge, and then forced her out of her home, (ST. 1177) with the exception of escorted food and bathroom privileges, for two days. During the interim two nights, she slept under the stars. A search warrant arrived two days later, July 6, 1982, between 6:00 and 6:30 p.m. During this 50 hour interim, Mrs. Veillette was not allowed to enter her home except for food or the use of the bathroom, and then only when accompanied by one to three officers (ST. 1180).

Petitioner was arrested, later on July 4, ten miles away, at a summer camp in Dedham, Massachusetts. He was charged with conspiring to distribute marijuana

in violation of Title 21 U.S.C. §841 and §846.

Though the District Court suppressed the two bales of marijuana found by Sgt. Bailey in the pickup truck, remaining evidence found in Thee Motorcycle Shoppe was found to be admissable on the basis of an "exigency" that any items of evidence might be destroyed, despite the demonstrable and obvious absence of any one in the Shoppe. Based in substantial part on this evidence, Petitioner was found guilty and timely appealed.

The First Circuit Court of Appeals overruled this finding of exigency, holding that no exigency existed which would have justified entry into the Petitioner's premises. (Appendix 98, et. seq.) However, the First Circuit, (Turruella, J.), held that the search was justified under a novel Franks v.

Delaware (infra) theory, though no such analysis had been briefed or argued by either party at any stage of the case. This decision, if allowed to stand, would create an intolerable conflict among the nation's lower courts, inasmuch as this theory is not only unique but logically untenable. Further, this error would place unfettered and unwarranted discretion in the hands of law enforcement, such that it must be corrected immediately.

ARGUMENT

The Supreme Court in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L. Ed. 2d 576 (1967), has stated,

> ....Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes, '...and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically

established and well-delineated exceptions. 289 U.S. at 357.

The intrusion into Thee Motorcycle Shoppe on July 4, 1982, has been held to fall within none of the constitutionally recognized exceptions, which are understood to be searches of automobiles in exigent circumstances, searches incident to a lawful arrest, seizures of items in plain view, consent searches, searches made while in hot pursuit or during other exigent circumstances, such as saving evidence from destruction. Indeed, no exigency could be held to have existed where agents suspected four days earlier that the marijuana was stored in this property. Thus, the Petitioner steadily maintained, and the First Circuit Court of Appeals properly held, that no exigency existed in the instant case which would overcome the per se

unreasonableness referred to in Katz. However, and uniquely among reported cases in the United States, the First Circuit improperly then sought to combine the inapposite cases of Segura v. United States, 468 U.S. , 82 L.Ed. 2d 599, 104 S.Ct. (1984) and Franks v. Deleware, 438 U.S. 154 (1978), to say that a reviewing court should excise tainted evidence from a search warrant in determining whether a warrantless search, occurring 50 hours before the warrant issues, is constitutionally justified.

To allow this decision to stand would not only create an intolerable conflict among the nation's lower courts, but would leave uncorrected an absurd misapprehension on the part of law enforcement agents which cannot be countenanced consistent with the Constitution.

In Segura, supra, it was declared by the majority that:

> [W]hether the initial entry was illegal or not is irrelevant to the admissability of the challenged evidence because there was an independent source for the warrant under which the evidence was seized ... None of the information on which the warrant was secured was derived from or related in any way to the initial (illegal) entry ... No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. 82 L. Ed. 2d at 614.

Conversely, where illegally obtained evidence was used to secure the warrant as is the case here, the illegality of the initial intrusion is relevant, and here determinative as well. Sgt. Bailey's detection of "a strong odor of marijuana" and the illegally-obtained two bales of marijuana were prominently used to secure the warrant which arrived two days after the initial intrusion. The marijuana, that which was so necessary to

establish probable cause, was discovered solely as a result of the illegal search. There was neither an independent source for such knowledge by the police nor was the subsequent search and seizure anything other than directly related to the unlawful invasion. To permit the government to use evidence gathered in the subsequent warrant search is to destroy the spirit and meaning of the exclusionary rule.

As articulated in the First Circuit's dissent, (Bownes, J.), no analogy can be made between Segura and the facts present here: (Appendix, 114 et seq.)

> In Segura, the issue, as stated by the Chief Justice, was "whether drugs and the other items not observed during the initial entry and first discovered by the agents the day after the entry, under an admittedly valid search warrant, should have been suppressed." 52 U.S.L.W. at 5130. The Chief Justice noted that "[e]vidence obtained as

the direct result of an unconstitutional search or seizure is plainly subject to exlcusion." Id. Under the facts of Segura, "[n]o information obtained during the intitial entry or occupation of the apartment was needed or used by the agents to secure the warrant." 52 U.S.L.W. at 5133. That is not the fact situation here; what the agents observed during the illegal search was made part of the affidavit application for the warrant that was issued.

In Segura, the time lapse between the initial entry and the issuance of the warrant was nineteen hours. The holding of Segura is specific: 'Specifically, we hold that where officers, having probably cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessary interests in its contents and take them into custody and, for no more than the period here involved, secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment's proscription against unreasonable seizures.'

52 U.S.L.W. at 5129 (emphasis added) (footnote omitted). My brothers have extended the time approved in Segura from nineteen hours to forty-eight hours. They do this "[i]n view of the complex circumstances of the case." Slip op. at 8. I see nothing complex in the circumstances; in fact, it is a

> fairly straightforward case. It is suggested that the delay was due to the fact that the day following [S.I.C. "following" should be "of"] the seizure was a holidy, the Fourth of July. But the warrant was not issued until the evening of July 5. [S.I.C. should be "July 6"] How much delay will be approved in the future on the basis of unarticulated complex circumstances?

Unarguably, the warrants were issued on the basis of information gained by exploitation of the July 4, 1982, illegal searches. Clearly, circumstances warranting a delay of the length present in the instant case must not only be articulated but proven if the government wishes to use such a delay to deny rights of constitutional magnitude. Yet no reason for such delay was offered or proven at any stage of the government's case.

As the dissent further points out, the ajority, recognizing that it was "stretching Segura out of context," next

did the same with Franks v. Delaware, supra. Franks has no application whatever to the instant set of facts.

In Franks, the warrant came before any search took place; thus, government agents had, at least procedurally, sought to interpose a magistrate's finding between probable cause and their search. No attempt to seek a magistrate's review of probable cause occurred here.

Secondly, in Franks, the primary issue was a procedural one: if a deliberate falsehood can be demonstrated in an affidavit supporting the pre-search warrant, an accused is entitled to a hearing on the subject. In the instant case, no hearing was ever afforded regarding facts pertinent to excission; Franks was neither briefed nor argued. Nor were facts in support of either side presented in evidence, for the simple

reason that the case is not analagous to any consideration here present. The logic behind a Franks excission approach applied to Franks-analagous facts, is that tainted facts may be logically excised from a warrant to find whether a reviewing magistrate, (not government agents), would have had sufficient untainted evidence for probable cause at the time of the magistrate's pre-search review. This logic has no application here, where there was no pre-search review. Excession of the tainted material here leaves evidence with which government agents should have sought review to obtain a warrant. They did not. Given the fact, as the First Circuit has held, that no exigency existed at the time of the raid or during the four days during which agents believed Thee Motorcycle Shoppe to

contain evidence, no consitutionally cognizable theory exists to justify their entry.

A Franks analysis thus leaves a result which affords no constitutional °excuse for the government's entry, search or seizure. To allow such a tainted warrant to retroactively justify unconstitutional conduct would be to eviscerate Fourth Amendment protections in a manner tantamount to the Writs of Assistance which that Amendment fought to abolish. As stated in Wong Sun v. United States, 371 U.S. 471 at 484-85, (1963):

> In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, Boyd v. United States, 116 U.S. 616, this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. Weeks v. United States, 232 U.S. 383. The exclusionary prohibition extends as well to the indirect as the direct products of such invasions.

Silverthorn Lumber Co. v. United States, 251 U.S. 385.

Never has a United States Court used Franks to justify the conduct involved here.

As a final analysis, this Court has, in recent pronouncements, mandated consideration of other factors in analyzing cases involving pre-warrant searches and seizures, United States v. Place, U.S. , 77 L.Ed. 2d 110, 103 S.Ct. ____ (1983), and Segura, supra. These factors may be summarized as:

1. The intrusiveness of the agent's conduct;

2. The brevity of the invasion of one's Fourth Amendment interests;

3. Whether agents, during the seizure deligently pursued their investigation; and

4. The nature of the privacy

intersts violated by governmental conduct.

The facts in the instant case likewise mandate suppression, based on all four consideration held determinative by Place.

Firstly, as to the intrusiveness of the agents' conduct, Petitioner's research discloses no case of an intrusion as offensive to fundamental freedom as that which occurred here. With no exigent circumstances and no warrant, agents threw a cinder block through the plateglass door of a demonstrably empty building, which was seized and held by armed officers for a period of two days until a search warrant was finally obtained. The issuance of the search warrants likewise came two days after a raid wherein .45 and .357 calibre pistols, shotguns and a

sub-machine gun were levelled by government agents at children, women and others peacefully gathered to celebrate America's independence from tyrannical government practices. This commando-style raid placed fifteen to twenty innocent people in genuine fear for their lives.

For two days and nights, while no warrant existed, an owner of the house who had no connection with the case was made to live outside and not allowed to leave. Certainly the abhorrent conduct of agents in the instant case far exceeds the conduct found to be constitutionally impermissible in Place.

Secondly, as to length of detention, the period of detention in the instant case, two days and two and one-half hours, closely approximates the weekend period held to violate the Fourth

Amendment in Place. Clearly, Segura, supra. which made 19 hours the constitutional limit for such conduct, buttresses a finding of a constitutional violation.

Thirdly, the privacy interest of Petitioner in Thee Motorcycle Shoppe strongly outweighs that of Place in his suitcase.

Fourthly, the question of whether the police diligently pursued their investigation is one which must be decided against the Government. Though only Governmental agents know why two days elapsed before the warrant was issued, their witnesses were not forthcoming with this information at hearing. Sgt. Bailey himself indicated that only a few hours were usually needed to obtain a search warrant. (ST. 1071) The great length of time during which the

agents failed to obtain a warrant, that factor which this Court in Place indicated was most important in determining whether a seizure is or is not minimally intrusive, precludes in the instant case a finding of the reasonableness of intrusion.

All of these factors militate in favor of the finding that the intrusiveness of the search and seizure of Thee Motorcycle Shoppe greatly outweigh any governmental interest in securing evidence before obtaining a warrant. The conclusion is clear that the intrusion upon the Petitioner's Fourth Amendment rights as articulated in Place, violative as they were, far outweighed any necessity for immediate action. The instant facts mandate suppression, based upon all four considerations made determinative by

Place.

## CONCLUSION

The Fourth Amendment provides:

> The right of people to be secure in their persons, houses, papers and effects, agaisnt unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly descriabing the place to be searched and the persons or their things to be seized.

Warrantless searches are per se unreasonable, Coolidge v. New Hampshire, 403 U.S. 443 (1971), such that illegally obtained evidence may not be used against one whose Fourth Amendment rights are thus violated, Wong Sun, supra; Silverthorne Lumber, supra.

According to United States v. Leon, 468 U.S. ____, 82 L.Ed. 2d 677, 104 S.Ct. 3405 (1984), the Court must consider whether suppression in a case of

governmental illegality will serve a deterrent purpose. In this judicial assessment, the flagrance of the illegality must be a strongly relevant factor. United States v. Place, supra.

The tragic flagrancy occurring on July 4, 1982, began when Agent Cunniff superarrogated to himself authority to conduct terrorist-style raids without apparently even considering a warrant. Such was the paucity of his information that he hadn't the faintest notion who or where any surveilled person was on any of the Veillette properties. His appallingly poor judgment led to a genuine atrocity, one of immense potential impact in terms of this Court's deterrent message.

The magnitude of the official lawlessness in this case compels the uncompromising use of a strong deterrent

expression to confirm for educable law enforcement agents, and to the lower courts, that such conduct was unacceptable under the Constitution, with the hopeful result, that when in the future such agents are faced with a judgment pitting zealousness against lawfulness, their decisions won't leave children with images of authority connected with images of terrorism.

The suppression of all fruits of this poisonous tree, commencing with the granting of the within Petition, is the only act by which this Honorable Court can affirm to Governmental agents and to the lower courts that such acts of inhumanity will not be judicially countenanced.

The granting of the within Petition and the suppression of all fruits of this illegality, it is respectfully submitted,

will remove the confusion engendered by the first Circuit's misapplication of caselaw, and will ameliorate the direct conflict between the decision below and decisions of this Court.

Respectfully submitted,

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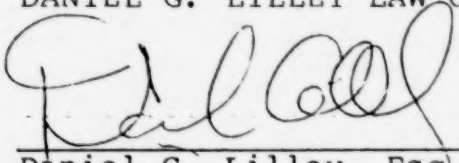

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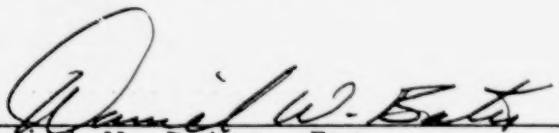

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